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Nos. 06-340, 06-549

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN FISHERIES SOCIETY, ASSOCIATION OF NORTHWEST STEELHEADERS, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, CALIFORNIA TROUT, FEDERATION OF FLY FISHERS, INSTITUTE FOR FISHERIES RESOURCES, MIAMI BEACH ROD & REEL CLUB, NATIVE FISH SOCIETY, NORTHWEST SPORTFISHING INDUSTRY ALLIANCE, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, TROUT UNLIMITED, AND WASHINGTON FLY FISHING CLUB IN SUPPORT OF RESPONDENTS

JAN E. HASSELMAN
Counsel of Record
PATTI A. GOLDMAN
EARTHJUSTICE
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340

JOHN F. KOSTYACK
MARY RANDOLPH SARGENT
NATIONAL WILDLIFE FEDERATION
1400 16th Street, NW, Suite 501
Washington, D.C. 20036
(202) 797-6800

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTERESTS OF *AMICI*[1]

Amici, American Fisheries Society, Association of Northwest Steelheaders, California Sportfishing Protection Alliance, California Trout, Federation of Fly Fishers, Institute for Fisheries Resources, Miami Beach Rod & Reel Club, Native Fish Society, Northwest Sportfishing Industry Alliance, Pacific Coast Federation of Fishermen's Associations, Trout Unlimited, and Washington Fly Fishing Club file this brief in support of respondents, Defenders of Wildlife *et al.* *Amici* are a diverse coalition of scientific, commercial, recreational, and conservation advocacy organizations dedicated to protecting and restoring the nation's fisheries and the aquatic habitats and water quality upon which they depend. At stake in this case is the continued effective functioning of two statutes designed to protect these resources – the Endangered Species Act and the Clean Water Act. *Amici* and their members depend on these laws for their livelihoods and recreational opportunities and for the conservation of a natural legacy for their children and grandchildren.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the Environmental Protection Agency ("EPA") violated the Endangered Species Act ("ESA") by transferring federal water pollution permitting authority to Arizona without first

[1] Pursuant to S.Ct.R. 37.3(a) and 37.6, the undersigned represent that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

ensuring that the transfer will not threaten the existence of ESA-listed species. EPA argues that it had no ESA duty to ensure that its transfer decision would protect imperiled species because the ESA inherently conflicts with its Clean Water Act ("CWA") § 402(b) duties. In this brief, *amici* American Fisheries Society *et al.* demonstrate that there is no conflict between the two statutes, and that EPA's conclusion to the contrary was reached through improper procedures and incoherent reasoning.

This brief describes the analytical steps that must be followed in applying the ESA to a CWA § 402(b) transfer decision, highlighting the discretion EPA exercises in making transfer decisions. First, as an action "authorized" and "carried out" by EPA, a transfer of permitting authority is an agency action subject to ESA § 7. *See infra* § I. EPA appropriately recognized this fact early in its consideration of Arizona's transfer request. As EPA recognizes even now, it must exercise judgment when determining whether a state meets the CWA criteria for transferring permitting authority. Moreover, EPA has ample discretion to limit the scope of the transfer and to impose conditions on the state as part of the transfer to ensure that it can effectively oversee state compliance. Thus, ESA § 7 consultation on the effects of this action informs two key decisions by EPA: how it will achieve ESA compliance in applying the CWA transfer factors, and how it will achieve ESA compliance in setting the terms of and carrying out its oversight role. Contrary to EPA's brief, this is not a case where there is *no* discretionary action that can be informed or shaped by an ESA § 7 consultation.

Second, the ESA sets forth detailed procedures for EPA to ascertain whether compliance with ESA's prohibitions against jeopardy and adverse modification of critical

habitat will collide with the agency's other statutory mandates. *See infra* § II. The statute also provides mechanisms for resolving such conflicts in the highly unusual situations when they arise. EPA and the U.S. Fish & Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, the "Services") first identify the effects of the action on listed species in the context of existing environmental conditions and other human activities.[2] The Services render their expert opinion on whether the action is likely to jeopardize the existence of listed species or adversely modify critical habitat. If so, the Services must propose an alternative *within the agency's authority* that would not cause jeopardy or adverse modification. Few consultations result in jeopardy or adverse modification findings, and in fewer still are the Services unable to articulate an alternative that can avoid jeopardy or adverse modification within the agency's existing authorities and goals. It is only after one of the Services makes a jeopardy or adverse modification finding and concludes that there are no alternatives to avoid it that a conflict arises. And even then, the ESA prescribes a process, involving cabinet-level Executive Branch officials, to resolve such conflicts and determine how and whether the action may proceed.

Here, EPA postulates an irresolvable conflict between the mandates of the ESA and CWA before it even starts the steps described above for identifying impacts to listed species and resolving potential conflicts with EPA's underlying statutory obligations. Citing this alleged statutory

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[2] Under the ESA, NMFS has jurisdiction over marine and anadromous species. FWS has jurisdiction over all other species. 51 Fed. Reg. 19,926 (June 3, 1986).

conflict, EPA asks this Court to excuse it from all ESA responsibilities in connection with its transfer decisions. However, under well-established precedent, courts should refrain from deciding whether one statute impliedly repeals another unless there is an irreconcilable conflict between the two statutes. *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citations omitted) (court "must read [two] statutes to give effect to each if we can do so while preserving their sense and purpose"). That admonition is particularly apt here, where Congress has created a process for agencies to identify and resolve conflicts between statutes.

Finally, EPA's *post hoc* rationalization for ESA non-compliance in this case contradicts both its policy guidance on decisions to transfer CWA permitting authority to states – adopted pursuant to notice and comment procedures – as well as its consistent past practice. *See infra* § III.

Because EPA never utilized the ESA's procedures for identifying and resolving conflicts, it would be premature for this Court to reach the court of appeals' alternative holding that the ESA gives EPA "additional" authority to take conservation measures in a hypothetical situation involving a conflict between the ESA and CWA. Instead, this Court should remand the transfer decision for EPA to follow the statutorily prescribed process for assessing the transfer decision's effects on threatened and endangered species. This analysis of effects should be used to achieve compliance with the ESA's jeopardy and adverse

modification prohibitions, to inform EPA's application of the nine CWA § 402(b) transfer criteria and the terms of its oversight, and to resolve any statutory conflicts in the unlikely event that they arise.

I. EPA'S TRANSFER OF CLEAN WATER ACT NPDES AUTHORITY IS AN AGENCY "ACTION" SUBJECT TO ESA § 7.

A. EPA's Transfer of Clean Water Act Authority to States.

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and *biological* integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). Critical to achieving this goal is the National Pollutant Discharge Elimination System ("NPDES"), which mandates technology- and water quality-based permits for the discharge of pollutants. *Id.* §§ 1312, 1311(b)(1)(C). The NPDES program regulates both industrial sources of pollution as well as upland construction and development activities that impact water quality. *See* 33 U.S.C. § 1342(p) (regulating industrial and municipal stormwater runoff).

The CWA allows states to apply to EPA to operate their own NPDES permit programs. To obtain permitting authority, a state must demonstrate, using the nine criteria in CWA § 402(b), that it will operate the program in a manner consistent with the CWA and that it has the resources and legal authority to do so. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.25. Among other things, the state must show that it has the authority to issue permits that will contribute to the maintenance and attainment of water quality standards. *See* 33 U.S.C. § 1342(b)(1)(A). These

water quality standards, developed by states with federal guidance and approval, lie at the heart of the CWA. *Id.* § 1313.[3] Water quality standards consist of designated uses of waterways (*e.g.*, protection of fish and wildlife, drinking water, or recreation), specific criteria that will ensure protection of designated uses, and measures designed to prevent degradation of high quality waters. *See* 40 C.F.R. §§ 131.10-.12.

States protect ESA-listed species in a variety of ways through water quality standards. For example, some states include ESA-listed species among their designated uses. *See, e.g.*, WASH. ADMIN. CODE § 173-201A-200 (2007) (designated uses include "salmonid spawning, rearing, and migration"); IDAHO ADMIN. CODE 58.01.02.100 (2006) (designated uses include salmonid spawning). Other states design state water quality criteria to meet the needs of ESA-listed species. *See, e.g.*, OR. ADMIN. R. 340-041-0028 (2007) ("The purpose of the temperature criteria . . . is to protect designated temperature-sensitive, beneficial uses, including specific salmonid life cycle stages in waters of the State"); MASS. REGS. CODE tit. 314, §§ 4.02, 4.05 (2007) (standards designed to protect aquatic life, which is defined to include "endangered species"); N.C. ADMIN. CODE tit. 15A, r. 2B.0110 (Jan., 2006) (requiring special water quality plans for waters that listed species inhabit). Others protect fish and wildlife generally among their designated beneficial uses. *See, e.g.*, 30 TEX. ADMIN. CODE

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[3] States are required to review their water quality standards every three years and submit any revised or new standard to EPA. 33 U.S.C. § 1313(c). EPA may disapprove these standards if they fail to meet CWA requirements and, if the state fails to correct the problems, EPA may promulgate its own standards. *Id.* § 1313(c)(3).

§ 307.7(b) (2007); FLA. ADMIN. CODE r. 62 302.400 (2007); MD. REGS. CODE tit. 26, § 08.02.01 (2005) (designated uses include "propagation of fish, other aquatic life, and wildlife"); OR. ADMIN. R. 340-041-0004 (2007) (anti-degradation policy specifically incorporates endangered species); *see also* 40 C.F.R. § 131.12(a) (antidegradation standards require protection of "existing uses," which can include habitat for endangered species); 40 C.F.R. pt. 132, App. F, Procedure 2.A.2 (prohibiting variances from water quality criteria that would harm listed species). In Arizona, fish and wildlife are among the designated uses protected by the state's water quality criteria, ARIZ. ADMIN. CODE R18-11-104(B), and the standards include special provisions for designating additional water quality standard limits to protect threatened or endangered species. *Id.* at R18-11-112(D)(4)(b); *see also id.* at R18-11-108 (narrative water quality criteria require water quality that protects aquatic life and is non-toxic to "humans, animals, plants, or other organisms").

By reviewing whether a state's proposed NPDES permitting program will contribute to the maintenance and attainment of water quality standards (through protection of designated uses and meeting criteria and anti-degradation requirements), EPA helps ensure that the program will protect ESA-listed fish and other water quality-dependent species. EPA may not transfer the NPDES permitting program to a state that lacks authority to ensure protection of these water quality standards. 33 U.S.C. § 1342(b). EPA also may approve partial transfers, keeping for itself the authority to issue NPDES permits

for the portion of discharges not transferred. 33 U.S.C. § 1342(n).[4]

Once EPA transfers NPDES authority to a state, whether full or partial, it retains an important role overseeing the state's program. 40 C.F.R. § 123.41-.46; *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) ("Congress preserved for the Administrator *broad authority* to oversee state permit programs") (emphasis added). As part of the transfer, EPA and the state execute a memorandum of agreement ("state MOA") setting forth oversight duties. 40 C.F.R. § 123.24. In a state where authority has been transferred, the CWA requires that EPA review permit applications and draft NPDES permits. 33 U.S.C. § 1342(d), (e). If a state draft permit is outside CWA "guidelines and requirements," EPA has the authority to object to the permit and stop its issuance. 33 U.S.C. § 1342(d)(2); 66 Fed. Reg. 11,202, 11,206 (Feb. 22, 2001). Contrary to the Ninth Circuit's erroneous declaration that neither the Services nor EPA have the authority to "mandate that the state revise any problematic permits," *Defenders of Wildlife v. EPA*, 420 F.3d 946, 973-74 (9th Cir. 2005), EPA may object to an individual permit that fails to ensure compliance with water quality standards, which, as described above, often protect ESA-listed species dependent on water quality. 40 C.F.R. § 123.44(c)(8). If EPA objects to a state draft permit and EPA's concerns are not addressed by the state, authority to issue the permit passes to EPA. 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(h).

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[4] Indeed, only a handful of states have been delegated full authority over all components of the NPDES program. *See* <http://cfpub1.epa.gov/npdes/statestats.cfm> (visited March 21, 2007).

EPA can withdraw or revise its approval for a state to operate a NPDES program if it finds that the state is not administering the program in accordance with the CWA. 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.62-.64. Possible grounds for revoking a transfer include failure to exercise control over regulated activities and repeated issuance of permits that do not protect water quality standards. EPA may also revise a state program if there is a change in state or federal law. 40 C.F.R. § 123.62. Because the EPA negotiates the state MOA at the time of transfer, the transfer decision provides a key opportunity for EPA to facilitate these oversight measures and to tailor its oversight role to the particular needs of each state.

B. EPA's Transfer Decision Involves Discretion.

As even EPA concedes, EPA's decision to transfer NPDES permitting authority to a state is not a rote or ministerial task, but rather involves the "exercise of judgment" to ensure that the state proposal meets CWA standards. EPA Br. at 17. Thus, while a NPDES transfer decision is not *completely* discretionary in the sense that EPA cannot freely refuse to transfer permitting authority to a state that otherwise complies with the nine criteria, EPA exercises significant discretion in assessing whether state-issued NPDES permits will meet water quality standards and other CWA requirements. EPA's role in a transfer decision is not to "rubber stamp" the state's paperwork, but rather to apply complex statutory standards to the unique facts of each state's program and water quality conditions. This analysis focuses in significant measure on whether the state program will adequately protect the habitats of water quality-dependent species in the state.

EPA also has substantial discretion over the content of the state MOA that accompanies the transfer and sets forth the parameters and procedures for EPA's oversight. *See, e.g.*, NPDES MOA Between the State of Maine and the U.S. EPA, Region 1 (Apr. 25, 2000) (hereinafter "Maine MOA") (proposed for lodging); MOA Between the Texas Natural Resource Conservation Commission and the U.S. EPA, Region 6 Concerning the NPDES (May 5, 1998) (hereinafter "Texas MOA") (proposed for lodging). For example, the state MOA dictates the number and kind of permit applications and draft permits that EPA will review. 40 C.F.R. § 123.24(b)(2). It specifies the frequency and content of reports which the state must provide to EPA. *Id.* § 124.24(b)(3). It identifies the kinds of permits EPA will review and the kinds for which review will be waived. 33 U.S.C. § 1342(d)(3); 40 C.F.R. § 123.24(d), (e). EPA may include any provisions in the state MOA that are consistent with its CWA authorities relative to the administration and enforcement of the state program. *Id.* § 123.24(a); *see also id.* (state MOA cannot restrict EPA's statutory oversight responsibility). Thus, for example, EPA could require the state to provide copies of draft permits for discharges in particularly sensitive habitats such as those of ESA-listed species or for discharges that contain a pollutant that threatens ESA-listed wildlife.

C. EPA's Transfer Decision Is a Federal Agency "Action" Within the Meaning of ESA § 7.

ESA § 7 directs all federal agencies, in consultation with the Services, to "insure that *any* action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered

species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species." 16 U.S.C. § 1536(a)(2) (emphasis added).[5] ESA regulations broadly define agency actions as including "all activities or programs of any kind authorized, funded, or carried out, in whole or in part" by the agency, including the "granting of licenses, contracts . . . [and] permits," and "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

Under the ESA's plain language, the decision to transfer NPDES permitting authority to Arizona, which includes both application of CWA § 402(b) transfer criteria and execution of the state MOA setting forth the terms of oversight, is an "action" within the meaning of ESA § 7. EPA has long recognized that transfer decisions are subject to the ESA's mandatory proscriptions, and has consulted with the Services to ensure that state programs do not jeopardize listed species. *See, e.g.*, 63 Fed. Reg. 51,164, 51,198 (Sept. 24, 1998) (approving Texas to administer NPDES permits and rejecting industry comment that ESA § 7 does not apply to transfer); 61 Fed. Reg. 65,047, 65,052 (Dec. 10, 1996) (approving Oklahoma to administer NPDES permits and noting that "EPA's approval of the State permitting program under Section 402 of the Clean Water Act is a federal undertaking subject to [the consultation] requirement"). Throughout the administrative proceedings in this case, EPA recognized that the transfer

[5] ESA § 7's prohibitions on jeopardy to listed species and adverse modification of their critical habitat are distinct legal duties. *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 n.46 (5th Cir. 2001) (citations omitted). For the sake of brevity, this brief uses the term jeopardy to encompass both.

of NPDES authority to Arizona was an agency action under ESA § 7.[6]

Upon requesting *certiorari*, however, EPA shifted its position, arguing that transfer is not subject to ESA § 7 at all. According to EPA, the transfer of CWA permitting authority is not an "action" within the meaning of ESA § 7(a)(2) because EPA has "no control whatever" over the transfer "but instead is directed by Congress" to perform it. EPA Br. at 25 n.7. However, EPA has extensive discretion in deciding whether and how to transfer NPDES permitting authority. Like virtually every federal agency action, there are boundaries on the exercise of that discretion, but EPA nonetheless has extensive control, both in applying the CWA § 402(b) transfer criteria and in setting the terms of oversight through the state MOA.[7]

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[6] Prior to the Supreme Court phase of this case, EPA consistently recognized that a NPDES transfer decision is an agency action under ESA § 7. *See infra* § III.

[7] EPA acknowledges that other actions it performs under the CWA are subject to ESA § 7. For example, under § 303(c) of the CWA, EPA has a duty to review and – if certain criteria are met – approve state water quality standards. *See* 33 U.S.C. § 1313(c). EPA's review of water quality standards and its review of state NPDES programs thus both require EPA to exercise its discretion within the boundaries imposed by statute. EPA does not explain why it believes that its approval of state water quality standards is an agency action subject to ESA § 7, while its approval of a state's NPDES transfer application is not.

II. EPA INCORRECTLY CONCLUDED THAT THERE IS AN IRRESOLVABLE CONFLICT BETWEEN STATUTORY MANDATES WITHOUT FOLLOWING THE ESA'S STEPS FOR IDENTIFYING AND RESOLVING SUCH CONFLICTS.

Petitioners EPA and National Association of Home Builders ("NAHB") argue that the ESA and CWA § 402(b) are in conflict as a matter of law and that EPA's transfer decision is therefore exempt from the ESA. However, EPA never attempted to determine whether it could satisfy the ESA while complying with CWA § 402(b). Instead, it prematurely concluded that there is an irreconcilable conflict between the mandates of the ESA and CWA, sidestepping the very procedures designed to identify and resolve such conflicts.

The ESA establishes an interagency consultation process to identify the effects of proposed actions on listed species and to determine whether and how those effects should be addressed consistent with the agencies' other statutory duties. Until EPA follows the prescribed procedures for evaluating the effects of transferring NPDES authority to Arizona on listed species that depend on adequate water quality, it cannot make a reasoned determination on whether compliance with the ESA's jeopardy prohibition would necessitate violating the CWA. Rather than working through the statutory process for harmonizing CWA and ESA obligations, EPA seeks to write the ESA out of the equation. This Court should reject EPA's invitation to speculate about an irresolvable conflict between the ESA and CWA when EPA has failed to follow the required procedures for identifying and resolving any such conflicts.

A. The ESA § 7 Process for Identifying and Evaluating an Action's Effects on Listed Species.

The first step in the ESA § 7 consultation process is to identify species that may be impacted by the agency action. Regulations implementing the ESA require a federal agency to review its actions "at the earliest possible time to determine whether any action may affect listed species. . . ." 50 C.F.R. § 402.14(a). An agency typically asks the FWS whether any listed species or species proposed to be listed may be present in the area of the proposed action. 16 U.S.C. § 1536(c). The agencies then determine the extent to which the proposed action will affect listed species. The agency proposing the action ("the action agency") begins this process by conducting a biological evaluation of the action's effects on listed species or their critical habitat. If the proposed action "may affect" listed species or critical habitat, the agency must formally consult with FWS. The action agency typically asks FWS to initiate formal consultation and transmits its biological review and effects findings to begin that process. Formal consultation culminates with FWS's issuance of a biological opinion. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(a).

In formulating a biological opinion, FWS is required to determine whether the effects of the proposed action, added together with cumulative effects and the environmental baseline, is likely to result in jeopardy. 50 C.F.R. §§ 402.02, 402.14(g)(4).[8] FWS must provide a "detailed"

[8] "Cumulative effects are those effects of the future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." "The environmental baseline includes the past and present

(Continued on following page)

discussion of the effects of the action on listed species and their habitat. *Id.* § 402.14(h)(2). The effects of the action include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action." *Id.* § 402.02. FWS also determines whether the action will incidentally "take" members of listed species. If so, FWS may authorize such take, subject to mandatory conditions to minimize the harm, as long as the take will not lead to jeopardy. 16 U.S.C. § 1536(b)(4).

B. EPA Overlooked Virtually All Potential Water Quality Effects to Species Which Must Be Analyzed Under ESA § 7.

Although EPA and FWS went through the motions of consulting on the NPDES transfer, they skipped most of the crucial analytical steps. In this case, FWS identified 60 listed species in Arizona that live in, adjacent to or otherwise depend on that state's surface water quality and thus may be impacted by NPDES permitting. Biological Opinion ("BO"), App. 1, 06-340 Pet. App. 122-24. EPA then conducted a biological evaluation and found that the proposed transfer "may affect" these listed species and their critical habitat, triggering a requirement to engage in formal consultation. Biological Evaluation ("BE"), 06-340 Pet. App. 587-88.

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impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." 50 C.F.R. § 402.02 (defining "cumulative effects" and "effects of the action").

What is unique about this consultation, compared to others, is the way the agencies then defined the "effects of the action." Prior biological opinions issued by FWS and NMFS confirm that the effects of the action, *i.e.*, the transfer, are the impacts to listed species of state-issued water pollution permits. *See, e.g.*, Biological Opinion on NPDES transfer to Maine, from Michael J. Bartlett (FWS) and Patricia A. Kurkul (NOAA) to Stephen Silva (EPA) (Jan. 12, 2001) at 18 (discussing effects of the action of transfer of NPDES authority to Maine) (proposed for lodging); Biological Opinion on NPDES transfer to Texas, from David Frederick (FWS) to Gregg Cooke (EPA) (Sept. 14, 1998) at 30 ("the area affected by the action includes all aquatic, riparian and terrestrial habitat that are or may be affected by issuance of TPDES [Texas Pollution Discharge Elimination System] permits") (proposed for lodging). In contrast, EPA's biological evaluation of the Arizona transfer fails to analyze or even discuss the harmful effects of CWA-permitted discharges on any of the 60 Arizona ESA-listed species, many of which (such as the Gila trout and the desert pupfish) depend entirely on the health of Arizona's rivers and streams for their survival. Instead, EPA summarily concludes that any harmful effects of such discharges would be "insignificant and/or discountable" because CWA protections under Arizona's administration of the program would be identical to those under federal administration. BE, 06-340 Pet. App. 616.

FWS's biological opinion, like EPA's biological evaluation, ignores most of the effects of the CWA-permitted discharges on the listed species and critical habitat of Arizona. It lacks virtually all of the critical elements required by the ESA and its regulations. Regarding the environmental baseline, nowhere does the biological

opinion assess current extinction threats facing any of the 60 listed species in Arizona. Instead, the baseline analysis briefly discusses just two listed species, the pygmy owl and Pima pineapple cactus. BO, 06-340 Pet. App. 108-11. Similarly, the cumulative effects analysis briefly mentions that such effects could lead to jeopardy to listed species, but then fails to elaborate. *Id.* at 115-16.

Regarding direct and indirect effects of the action, the biological opinion lacks any analysis of the biological effects of state NPDES permits on listed species. It never discusses what types of pollution will be discharged into rivers and streams occupied by listed species. Nor does it assess the measures that Arizona will employ to ensure that listed fish species will not be exposed to contaminated water. FWS admits that "there will likely be indirect effects stemming from water quality issues," without describing these water quality issues and indirect effects. *Id.* at 113. Instead of analyzing the *biological* effects of the transfer, FWS offers a *legal* conclusion that the loss of ESA consultations resulting from the transfer is not an effect covered by the ESA and its regulations. *Id.* at 114-15.

In failing to analyze the biological effects of the action on ESA-listed species in the context of existing conditions and other activities affecting water quality, FWS not only violated its own regulations, *see* 50 C.F.R. § 402.14, it left itself and EPA incapable of evaluating whether these species would be jeopardized by the proposed transfer. Without such an evaluation, EPA could not legitimately conclude that complying with its ESA duty to avoid jeopardy required violating the CWA.

If FWS and EPA had properly analyzed the biological effects of transfer, EPA would have had a basis for deciding whether Arizona's program was adequate to protect the water quality upon which listed species rely. If the program was deemed inadequate, EPA potentially could have denied the transfer, in whole or in part, consistent with its CWA duty to ensure that state proposals meet the CWA's minimum criteria. Even if EPA were required by the CWA to transfer authority to Arizona, it could have ensured against jeopardy to ESA-listed species using its CWA oversight authority by recommending changes to draft permits and if necessary, vetoing them and issuing its own. By the same token, EPA could have ensured against jeopardy by using its discretionary authority to revoke a state transfer where the state repeatedly issues permits that are not sufficiently protective of water quality-dependent species. 33 U.S.C. § 1342(c).

Finally, EPA broadly asserts that ESA § 7 does not require action agencies to protect listed species from harms caused by other actors. EPA Br. at 22. However, the ESA requires agencies to ensure that "any" action that they "authorize" or "fund" is not likely to jeopardize listed species. 16 U.S.C. § 1536(a)(2). Agency permits, which authorize activities by others, are among the agency actions that must comply with ESA § 7. 50 C.F.R. § 402.02 ("action" defined as including "granting of . . . permits"). Thus, the federal permitting agency must ensure that activities authorized by the permit, even if carried out by private parties, will not cause jeopardy. *See, e.g.*, *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170 (D.D.C. 2004) (biological opinion analyzed impacts of activities by mining permittee, not just permitting agency). The ESA has never

been read to limit § 7(a)(2) to those instances where the federal agency is the entity discharging the pollutant.

C. EPA Failed to Utilize the ESA's Procedures for Resolving Potential Statutory Conflicts.

As noted above, the ESA prescribes a process for ascertaining whether there is a conflict between an agency action and the ESA, and if so, for resolving any such conflict. Had EPA and FWS followed this process, any effects of transferring NPDES authority to Arizona that cause jeopardy would likely have been identified and mitigated pursuant to EPA's CWA authority as part of the application of the CWA § 402(b) transfer criteria and the development of the accompanying state MOA.

The first step in the conflict resolution process is for FWS and EPA to perform a meaningful effects analysis and determine whether the proposed action would lead to jeopardy. If no jeopardy is found, then EPA's § 7(a)(2) obligations with respect to the proposed action are complete. Having ensured that jeopardy will not occur, EPA can proceed with the transfer and there is no potential for conflict with its CWA § 402(b) obligations. The picture changes if consultation results in a determination that the transfer of NPDES authority to Arizona would jeopardize the existence of any listed species. In a jeopardy situation, the ESA requires FWS to propose a "reasonable and prudent alternative" ("RPA") that would enable EPA to avoid violating ESA § 7(a)(2) but that also is within the scope of EPA's CWA authority. 16 U.S.C. § 1536(3)(A). RPAs are alternatives to proposed actions that do not cause jeopardy to a species, are consistent with the intended purpose of the action, and "can be implemented

consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. § 402.02. Thus, in situations where specific components of an agency's action are truly nondiscretionary, a valid RPA could allow those components to proceed but require the agency to take other mitigating actions within its authority to remove the jeopardy to listed species.

In this case, because FWS and EPA never performed an adequate analysis of the transfer's effects on ESA-listed species, neither agency assessed whether jeopardy would occur. Even if jeopardy had been found, FWS and EPA would likely have been able to craft an RPA allowing the transfer to proceed but ensuring against jeopardy. For example, an RPA could have been designed to enable EPA to scrutinize, object to, or federalize individual state-issued permits that present significant risks to listed species by undermining water quality. Having never even investigated the possibilities of jeopardy and RPAs, however, EPA could not rationally conclude that the specific conservation measures needed to avoid violating ESA § 7(a)(2) would violate CWA § 402(b).

Finally, in cases where FWS concludes that jeopardy will occur, and the agencies are unable to identify an RPA that would avoid this result while allowing the agency to proceed in a manner consistent with its authorities, the ESA prescribes a process for resolving this statutory conflict. Under ESA § 7(g), a federal agency may apply to a Cabinet-level "Endangered Species Committee" for an exemption from ESA § 7(a)(2), *i.e.*, for permission to proceed with an action that will jeopardize a listed species. 16 U.S.C. § 1536(g). The Committee is authorized to grant an exemption only upon a showing of several substantive criteria. *Id.* § 1536(h)(1)(A). In contrast to an RPA, which

by definition must be consistent with the agency's authorities, in deciding whether to grant an exemption, the Committee may consider alternative courses of action that are "beyond original project objectives and acting agency jurisdiction." 50 C.F.R. §§ 450.01, 453.03(a)(1)(ii).

Had EPA and the Services concluded that NPDES transfer to Arizona would have caused jeopardy to any species, and had they been unable to identify any RPA within EPA's authority to avoid jeopardy, the ESA would have required EPA to seek an exemption from the Committee before proceeding with the transfer. Indeed, Congress established this exemption process to address the very situation EPA claims to find itself in here – an irresolvable conflict between the ESA and a proposed action. Congress's creation of this elaborate conflict resolution mechanism demonstrates that it did not intend to exempt actions that only theoretically pose a statutory conflict from compliance with the ESA.

D. EPA's "Legal Causation" Argument Is Inconsistent with the ESA's Procedures for Resolving Potential Statutory Conflicts.

EPA seeks to circumvent the ESA's process for identifying and resolving statutory conflicts by arguing that Congress, not EPA, is the legal cause of any harmful effect of the proposed transfer. EPA argues that it is not the "legal cause" of any effects to listed species as a consequence of the proposed transfer, and therefore the transfer decision is not subject to ESA § 7. EPA Br. at 23. This approach suffers from several analytical flaws.

As a threshold matter, EPA's "cause" argument is simply a variant of its flawed "lack of discretion" argument. EPA argues that any effects must have been caused by Congress since they flow from a transfer which Congress dictated must occur. The premise underlying this argument is incorrect. As discussed in § I.B. *supra*, EPA has discretion under the CWA to make multiple judgment calls in applying the nine CWA § 402(b) transfer criteria – which specifically incorporate the protection of fish and wildlife – and in setting the conditions of the state MOA.[9]

Moreover, EPA's causation argument confuses two fundamentally separate questions: (1) is a transfer of NPDES authority an "action" that is "authorized, funded, or carried out" by EPA?; and, (2) if so, what effects must be analyzed in a consultation on that action? In its "causation" argument, EPA promotes a theory under which the second question subsumes the first, such that an action that allegedly causes no effects is no longer an "action" subject to the ESA. However, ESA § 7 applies to *any* action authorized, funded or carried out by a federal agency, and the consultation process is the mechanism for evaluating the action's effects. The concept of "legal causation" plays no role in determining whether the transfer or any other agency action constitutes an "action" within the meaning of § 7(a)(2). Rather, since the transfer is plainly an action subject to ESA § 7, EPA and FWS must proceed to analyze its direct and indirect effects in the context of current

[9] EPA argues that it was "undisputed" that the CWA § 402(b) criteria had all been satisfied. EPA Br. at 11. However, respondents never conceded that the CWA criteria had been met. Their case focused solely on EPA's ESA noncompliance.

conditions and other activities in an ESA consultation. *See supra* § II.A. This analysis never took place.

EPA's argument that Congress is the cause of any effects (and that the ESA is therefore inapplicable to this action) relies almost exclusively on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). A comparison of *Department of Transportation* to this case reveals that it lends little support to EPA's sweeping legal causation argument. First, the Department of Transportation ("DOT") acknowledged (and no party or reviewing court disputed) that the issuance of its regulations constituted an "action" subject to the National Environmental Policy Act ("NEPA"), the statute at issue. 541 U.S. at 761. Thus, EPA's proposed interpretation of "action" under the ESA finds no support in *Department of Transportation*.

Second, NEPA, like the ESA, prescribes a process for an agency to evaluate the effects of its actions. DOT followed this process and assessed the effects of the motor carrier safety regulations along with the impacts of the entry of Mexican trucks entering the United States as a result of the President's lifting of a moratorium. *Id.* at 761, 769-70. The Court in *Department of Transportation* ruled on DOT's discretion and authority only after DOT developed the facts through the NEPA process. It did not invite the courts to make judgments about the discretion and authority of federal agencies where, as here, statutorily-mandated procedures have not yet been followed and the facts therefore have not yet been developed.

Third, NEPA and the ESA differ in that NEPA merely imposes procedural obligations to disclose and analyze an action's environmental impacts, while the ESA contains substantive prohibitions against certain detrimental

impacts on listed species. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) (refusing to extend NEPA precedent to ESA case as two statutes "serve different purposes"). Accordingly, mere disclosure and consideration of the action's effects against the backdrop of current conditions and other activities is the end point under NEPA, but not under the ESA. If the result will jeopardize a listed species, the ESA goes further than NEPA and seeks to eliminate or minimize that impact, and the ESA administrative process has additional steps to achieve that result.

Finally, the statutory mandates of EPA and DOT differ in that DOT has an obligation to register all motor carriers that are willing and able to comply with safety and financial responsibility requirements. The agency has no authority to act on the basis of environmental impacts of the truck traffic. In contrast, before EPA can transfer NPDES permitting authority to a state, it must determine that certain criteria pertaining to water quality are satisfied, and it has the authority to condition the transfer to aid in exercising its oversight to achieve water quality goals. EPA is incorrect in suggesting that its authority to prevent harm to listed species is as constrained as the DOT's authority to act to prevent environmental harm.

In the end, the transfer is an "action," just as the safety regulations were an action in *Department of Transportation*. In each situation, the agencies had a duty to analyze the action's effects in accordance with statutorily mandated processes. While DOT did so, EPA did not and therefore EPA has not worked through the administrative process to identify any legal causation or conflict issues to be resolved by the courts.

III. EPA'S ARGUMENTS ARE IMPROPER *POST HOC* RATIONALIZATIONS AND DIRECTLY CONTRADICT POSITIONS IT ADOPTED THROUGH NOTICE AND COMMENT RULEMAKING.

In its petition for a writ of *certiorari*, EPA argued for the first time in this litigation that ESA § 7 does not apply to CWA § 402(b) transfer decisions. Accompanying the petition was a recent, hasty exchange of letters with the Services, in which the agencies adopt this new legal position in the context of an otherwise dormant Alaska NPDES transfer proposal.[10] Because these rationalizations for ESA noncompliance were articulated outside the scope of the administrative record, fundamental precepts of administrative law require that they be disregarded. *See Sec. and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 92-95 (1943).

In addition, this Court owes little deference to EPA's newly-constructed interpretations of the interplay of the ESA and CWA because they were developed informally, without the benefit of public notice and comment. *See U.S. v. Mead*, 533 U.S. 218, 230-31 (2001). Deference is particularly unwarranted because EPA reversed course and abandoned interpretations that it adopted in 2001 through rulemaking procedures. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446, n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."); *Motor Vehicle*

[10] Because EPA had previously rejected Alaska's transfer proposal as incomplete, there was no apparent reason for the agencies to address EPA's ESA duties as to the Alaska transfer other than to buttress EPA's position in this litigation.

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (courts impose presumption "against changes in current policy that are not justified by the rulemaking record."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[11]

In 2001, the EPA, NOAA Fisheries, and FWS entered into a national agreement regarding enhanced coordination under the CWA and ESA. *See* Memorandum of Agreement Between the EPA, FWS, and NMFS Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202 (Feb. 22, 2001) ("Coordination Agreement"). In this Coordination Agreement, adopted after public notice and comment, EPA reaffirmed its long-held view that the objectives and structure of the CWA are "compatible and complementary" with those of the ESA. *See id.* at 11,208. EPA recognized that water-dependent ESA-listed species are "an important component of the aquatic environment that the CWA is designed to protect," *id.* at 11,206, and that the CWA "is a powerful vehicle for improving the quality of the aquatic environment on which many endangered and threatened species depend." *Id.* at 11,203.

The Coordination Agreement acknowledges that "EPA's current practice is to consult with the Services

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[11] *See also Nat'l Family Planning and Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992) ("When an agency promulgates a legislative regulation by notice and comment directly affecting the conduct of both agency personnel and members of the public, whose meaning the agency announces as clear and definitive to the public and, on challenge, to the Supreme Court, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule.").

where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species." *Id.* at 11,205.[12] The focus of the Coordination Agreement is not on how EPA might deny transfer requests, but rather how EPA will oversee state permits once the state has assumed permitting authority. Although the Coordination Agreement acknowledges that EPA can object only to those permits that are outside the "guidelines and requirements of the CWA," it affirms that the CWA's "authorities are sufficiently broad . . . to address the broad range of situations that arise in the NPDES program." *Id.* at 11,206.

> EPA has authority and responsibility for overseeing the operation of State/Tribal NPDES programs through, among other means, review of State/Tribal NPDES permits where appropriate. EPA's oversight includes consideration of the impact of permitted discharges on waters *and species that depend on those waters.* EPA does this by among other things, determining whether State and Tribal permits indeed attain water quality standards. . . . Where EPA determines that the exercise of its objection authority is appropriate to protect endangered and threatened

[12] NAHB argues that EPA did not consult on the majority of its transfer decisions made before 1993. NAHB Br. at 11. However, this was not based on any argument that ESA § 7 is inapplicable to transfer decisions. Many state transfer decisions occurred early in the implementation of the ESA, prior to most ESA listings, 39 Fed. Reg. 26,061 (July 16, 1974) (approval of transfer requests from 15 states). No consultation is required where state-issued permits will not affect a listed species. *See* 50 C.F.R. § 402.14(a). Neither NAHB nor EPA cite to any occasion prior to the Supreme Court phase of this case where EPA has asserted that ESA § 7 does not apply to CWA § 402(b) transfer decisions.

> species, the Agency will act pursuant to its existing authorities under the CWA, (i.e., where the proposed permit would be "outside the guidelines and requirements" of the CWA).

Id. 11,215 (emphasis added). Where a state permit is likely to result in jeopardy to a listed species, EPA will "use the full extent of its CWA authority to object" to the permit. *Id.*

The Coordination Agreement also confirms that, under existing regulations, states with transferred NPDES programs are required to provide draft permits to the federal fish and wildlife agencies, and respond to any concerns that they raise. *See id.* at 11,206 (citing 40 C.F.R. § 124.10(c)(iv),(e); § 124.11, § 124.17, § 124.59(b),(c)). While the Coordination Agreement does not purport to alter any agency's existing authorities, it seeks to "ensure[] that EPA has the full benefit of the Service's views on potential impacts to Federally listed species and designated critical habitats in determining whether CWA requirements are met." *Id.* Of course, if EPA federalizes a permit because of unresolved objections and issues a permit on its own, EPA must consult pursuant to ESA § 7 on that action to ensure compliance with the ESA's no-jeopardy mandate. *Id.* at 11,215.

The Coordination Agreement's approach is embodied in various state MOAs that EPA has executed at the time of transferring CWA § 402(b) authority. In the Maine MOA, for example, EPA and the state agree that state permits would protect ESA-listed species by ensuring compliance with state water quality standards, and that EPA would object to any permit that risks harm to a listed species by threatening water quality. Maine MOA at 4; *see also* Texas MOA at 32-33 (describing mechanism for ensuring that Texas permits do not harm listed species – if

concern is raised and state does not resolve, EPA "shall" assume jurisdiction and issue the permit). *See also* § I.C. *supra* (describing other transfer decisions where EPA successfully integrated the ESA and CWA).

In summary, in 2001 EPA decided, after a full notice and comment procedure and careful deliberation, that the ESA and CWA are easily harmonized and that compliance with CWA § 402(b) does not preclude compliance with ESA § 7. Its consistent practice across the states has been to harmonize the two statutes and acknowledge its ESA § 7 duties. This Court should reject EPA's improper attempt to put forth a contradictory position in the late stages of this litigation and instead should require that EPA undergo ESA consultation on its proposed Arizona transfer decision and set forth its conclusions and rationale in the administrative record.

CONCLUSION

For the reasons stated above, this case should be remanded to EPA to consult with FWS on the biological effects of its proposed transfer decision consistent with the CWA and ESA.

Respectfully submitted,

JAN E. HASSELMAN, *Counsel of Record*
PATTI A. GOLDMAN
EARTHJUSTICE
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340

JOHN F. KOSTYACK
MARY RANDOLPH SARGENT
NATIONAL WILDLIFE FEDERATION
1400 16th Street, NW, Suite 501
Washington, D.C. 20036
(202) 797-6800

Counsel for Amici Curiae